No. 22,180

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

LENNARD L. MEAD; ALBERT CHUNN; A. V. HOHN; RICHARD QUINE; ALDEN JOHNSON; VIOLET MEAD; and RAY R. SENCE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, Jr.,
United States Attorney,

JOHN C. ELDRIDGE,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

I N D E X

C I T A T I O N S

Cases:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,180

UNITED STATES OF AMERICA,

Appellant,

v.

LENNARD L. MEAD; ALBERT CHUNN; A. V. HOHN; RICHARD QUINE; ALDEN JOHNSON; VIOLET MEAD; and RAY R. SENCE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

I. THE FALSE CLAIMS ACT AND MISTAKE CLAIMS AGAINST DEFENDANT-APPELLEE LENNARD L. MEAD

A. THE FALSE CLAIMS ACT VIOLATIONS

1. The False Claims Act is broadly phrased to reach any person who makes or causes to be made "any claim upon or against" the United States, "knowing such claim to be false, fictitious, or fraudulent * * *," or who knowingly makes or causes to be made a false "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for the purpose of "obtaining or aiding to obtain the payment or approval" of such a claim. R.S. § 5438(1878). There can be no doubt that defendant-appellee Lennard L. Mead (hereafter "Mead") violated

these provisions of the Act, for, as shown in our main brief (pp. 21 et seq.), (1) the invoices which Mead prepared in support of the farmers' and ranchers' applications for payment of their Federal cost-shares were used by the Government in computing the amount of its share of the conservation practices it had previously approved; and (2) Mead's invoices intentionall overstated Mead's actual charges to the farmers and ranchers for his materials and services.

Appellees assert (Appellees' Brief, p. 18) that none of the claims filed with the Government were "false" since "the government paid no more than its proper percentage of the fair price and reasonable cost of the project." That contention, however, is irrelevant under the agricultural program here involved, for the regulations plainly contemplate a "cost-sharing" program. Under the regulations, the maximum Federal cost-share for each approved practice was to be "the percentage of the average cost of performing the practice considered necessary to obtain the needed performance of the practice, but which will be such that the farmer or rancher will make a substantial contribution to the cost of performing the practice" (Emphasis supplied). 1959 Regulations, Section 1101.1011(a), 23 Fed. Reg. 5250. [1/] Thus, the farmer or rancher was required to pay that

---

1/ Identical provisions are found in Section 1101.811(a) of the 1957 Regulations, 21 Fed. Reg. 5036, and Section 1101.911(a) of the 1958 Regulations, 22 Fed. Reg. 6485.

part of the cost of conservation materials or services furnished through the program for use in carrying out an approved practice which was "in excess of * * * the Federal cost-share" attributable to the use of the material or service. 1959 Regulations, Section 1101.1027(b), 23 Fed. Reg. 5252. 2/

In other words, the United States did not undertake to pay for conservation practices on the basis of a contractor's alleged estimate of "fair price" or "fair value." Instead, the Government undertook a "cost-sharing" program under which it would pay a percentage of the actual cost of the practice to the farmer or rancher, who would make a substantial contribution by paying the balance. 3/ In the instant case, as demonstrated in our main brief (pp. 22, 25-27), the cost-sharing regulations were plainly frustrated since Mead's inflated invoices (1) caused the Government to pay out more money than it would have paid if a true invoice had been submitted, and (2) permitted the farmer or rancher to pay less than his proportionate share of the cost of the practice.

2/ Identical provisions are found in Section 1101.827(b) of the 1957 Regulations, 21 Fed. Reg. 5038, and Section 1101.927(b) of the 1958 Regulations, 22 Fed. Reg. 6486-6487.

3/ In ordinary commercial usage, the word "cost" signifies "the price, or part of it, paid by the buyer to the seller as consideration for the sale of goods." City Ice Delivery Co. v. United States, 176 F. 2d 347, 352 (C.A. 4). "Cost" is distinguished from "fair market" value (Buck v. Burk, 18 N.Y. 337, 340--1858) and takes into account any "discounts" which the purchaser receives (David Condon, Inc. v. Stein, 122 N.Y.S. 2d 567 (N.Y.C. Munic. Ct., 1953)). There is no doubt that "cost," under the regulations here involved, means the price actually paid by the farmer or rancher to the contractor.

There is no merit in appellees' contention (Appellees' Brief, p. 23) that Mead's invoices did not purport to represent to the Government the amount he actually was to receive from the farmer, but only represented the "fair price" or "true cost" for the project. In the context of the agricultural regulations here involved, there can be no doubt that the figures on the invoices submitted to the Government by Mead purported to represent the actual prices charged the farmers or ranchers. The various invoices are plainly marked "Bill to" defendant-appellee Chunn (Pltf's. Exh. No. 3); "Bill to" defendant-appellee Hohn (Pltf's. Exh. Nos. 22, 25, 34); "Bill to" defendant-appellee Quine (Pltf's. Exh. No. 42); "Bill to" defendant-appellee Johnson (Pltf's. Exh. No. 51); "Bill to" defendant-appellee Sence (Pltf's. Exh. No. 60); "Bill to" Henderson Ranch (of which Gale B. Graham was co-owner) (Pltf's. Exh. No. 68); and "Bill to" defendant-appellee Violet Mead (Pltf's. Exh. No. 72). In ordinary commercial usage, a "bill" represents "the creditor's written statement of his claim, specifying the items." 1 Bouvier's Law Dictionary, Rawle's Third Revision, p. 345. See, also, George M. Jones Co. v. Canadian Nat. Ry. Co., 14 F. 2d 852, 855 (E.D. Mich.), affirmed, 27 F. 2d 240 (C.A. 6), taking judicial notice of the fact that the word "bill" is "generally and customarily used in business and commercial intercourse as synonymous with 'charge' or 'invoice'."

4/ An "invoice" in ordinary commercial usage is "An account of goods or merchandise * * * which * * * ought to contain a detailed statement, which should indicate the nature, quantity, quality, and prices of the things sold, deposited, etc. * * *." 1 Bouvier's Law Dictionary, Rawle's Third Revision, p. 1682.

However, Mead's actual "written statement of his claim" or "charge" or "invoice" for the conservations materials and services was not, in fact, given on the documents filed with the Government, but appeared, instead, on the "duplicate" invoices which Mead prepared and sent to the farmers or ranchers. See pp. 5 and 14 of our main brief, and Pltf's. Exh. Nos. 42-A and 51-A. And the record shows that Mead's inflated invoices, which falsely represented to the Government the charges made to the farmers or ranchers, were used by the Government in computing the amount of its share of the practices (Tp. 52, 74, 204).

There is also no merit in appellees' contention (Appellees' Brief, p. 24) that the discounts given by Mead were "a personal gratuity" in which the Government had no interest. The short of the matter is that the Government needed to know about any such "discounts," for, under the agriculture regulations here involved, such "discounts" would result in a reduction of the amount of money which the Government would pay for the conservation practices. 5/

5/ Contrary to appellees' assertion (Appellees' Brief, pp. 25-26), the district court did not find that the invoices were not inflated in the case of the transactions with Hohn and Chunn. Mead's own testimony indicates that Chunn did not make payments or contributions in the amount of the difference between the total reported cost and the Federal cost-share (see our main brief, pp. 10-11). As to Hohn, Mead's own testimony also indicates that in 1958 Hohn failed to make payments or contributions in the amount of the difference between the total reported cost and the Federal cost-share. The varying estimated contributions by Hohn for 1957 and 1959, as to which no finding was made, were not listed on the invoices submitted to the Government, as they were required to be (see our main brief, pp. 12-13, and p. 11, fn. 9).

2. Contrary to appellees' assertion (Appellees' Brief, p. 26), the district court did not, expressly or by implication, find that Mead did not have the state of mind which is a prerequisite of liability under the False Claims Act. Indeed, as we read the court's findings, they are adverse to Mead on this issue (see infra, pp. 17-18). In any event, as we show below, on this record there can be no question but that Mead had the requisite state of mind for liability under the False Claims Act.

It should be noted initially that, contrary to appellees' statement (Appellees' Brief, p. 23), our main brief did not recognize any obligation on the part of the Government to establish any "fraudulent intent." The Government must prove that the defendant "knowingly" filed false bills or claims, but, as we first show, there is no requirement in the Act that a specific intent to defraud be proved. 6/ Moreover, as we shall go on to show, even if an intent to defraud is a necessary element in the Government's case, Mead had such intent. As Mead himself stated, "I knew at the time that the methods which I used to obtain the maximum cost share for the farmers were not proper * * * " (Pltf's. Exh. No. 81, p. 1). 7/

6/ The United States Attorney made this same point at the trial (Tp. 318, 445-446).

7/ Appellees are also wrong in their assertion (Appellees' Brief, pp. 21-23) that the Government must prove its case by "clear and convincing evidence." As the Fourth Circuit stated in Toepleman v. United States, 263 F. 2d 697, 699, certiorari denied, 359 U.S. 989, the False Claims Act's "sanctions (continue

a. The False Claims Act provides for six different eventualities which will give rise to civil liability: (1) presenting a claim upon the Government, "knowing such claim to be false, fictitious, or fraudulent"; (2) using a false bill, receipt, etc., "knowing the same to contain any fraudulent or fictitious statement or entry" to obtain approval or payment of such a claim; (3) conspiring "to defraud the Government" by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim"; (4) delivering military property or money less than that for which a receipt was taken "with intent to defraud the United States" or "willfully to conceal such money or other property"; (5) delivering a receipt for property "without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States"; and (6) purchasing or receiving in pledge property from a serviceman, knowing that such person does not have the lawful right to sell or pledge such property. [Emphasis added.] R.S. § 5438 (1878). Only the third and fifth grounds of liability, which are not applicable to the instant case, require intent to defraud as an absolute, rather than alternative, element of the offense.

(continued)

are so far civil in character that the trial * * * includes such civil attributes as * * * proof by a preponderance of the evidence * * *." Even one of the cases cited by appellees, United States v. Park Motors, Inc., 107 F. Supp. 168, 176 (E.D. Tenn.), merely requires the Government to "show by the preponderance of proof that defendant * * * intended to and did present a false claim to the Government * * *." Furthermore, even if the standard is "clear and convincing evidence," that was certainly met here.

By way of contrast, the first and second grounds, which form the basis for liability in this case, provide for intent to defraud only as an alternative element. This explicit statutor pattern led the Tenth Circuit, in an opinion by Judge Phillips, to conclude in Fleming v. United States, 336 F. 2d 475, 479, certiorari denied, 380 U.S. 907, that a specific intent to defraud is not a necessary element of the Government's case under the first clause of the False Claims Act:

> The first portion of the Act, that which the United States claims Fleming violated, provides for liability in the event of a "false, fictitious or fraudulent" claim. By the use of the disjunctive "or" Congress made it clear that any one of the three wrongful types of claim would subject the claimant to liability and that the claim need not be "fraudulent" so long as it is "false."
>
> Further, it should be noted that the Act provides for six different eventualities which will give rise to liability for a $2,000 forfeiture and double damages * * *
>
> Only the third and fifth of such eventualities contains the element of fraud or intent to defraud as an absolute, rather than an alternative element. Had Congress intended to incorporate fraud or intent to defraud into each portion of the Act, it is unlikely that it would have done so expressly in two portions and not in the remaining portions.

To the same effect see United States v. Toepleman, 141 F. Supp. 677 (E.D.N.C.), reversed in part on other grounds sub nom. United States v. McNinch, 242 F. 2d 359 (C.A. 4), reversed on other grounds sub nom. United States v. McNinch, 356 U.S. 595, where the district court held (141 F. Supp. at 683):

> * * * the Government's case is made by showing that a false claim was knowingly filed and * * * it is unnecessary to show either an intent to defraud or resulting damage. In some of the clauses of the act it is expressly provided

> that there must be shown an intent to defraud, but in the clause applicable here no such words are used. Proof of knowingly presenting a false claim is all that is required.

Accord: United States v. Eagle Beef Cloth Co., 235 F. Supp. 391 (E.D.N.Y.).

Appellees' assertion that a requirement of "intent to defraud" should be read into the first two clauses of the False Claims Act is based upon the view expressed by some courts (Appellees' Brief, pp. 21-23) that the False Claims Act is penal in nature. A case chiefly relied upon by these courts is Morissette v. United States, 342 U.S. 246, 263, where the Supreme Court held that the omission from the criminal conversion statute (18 U.S.C. 641) of any mention of criminal intent could not be construed as eliminating that element of the crime.

There are two basic weaknesses in appellees' argument. First, the characterization of the civil remedies in the False Claims Act as penal has been thoroughly discredited by the Supreme Court. In United States ex rel. Marcus v. Hess, 317 U.S. 537, 549, the Supreme Court held that the Act is remedial and the sanctions civil, not penal. The Court stated (317 U.S. at 549):

> We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it.

This rationale has been repeatedly reaffirmed. Rex Trailer Co. v. United States, 350 U.S. 148, 152-154; Koller v. United States, 359 U.S. 309; United States v. Hougham, 364 U.S. 310, 313.

The Morissette principle of construing criminal statutes to require criminal intent has a strong theoretical, if not constitutional, basis. The basic distinction between a civil and a penal sanction is that the latter carries with it societal condemnation. In the absence of criminal intent, it is generally regarded as unjust to condemn the individual. There is no basis, however, for applying the Morissette principle to a civil action under the False Claims Act. 8/ A civil judgment against the defendant does not result in imprisonment or brand him a criminal. The civil remedies under the False Claims Act, including the double damages plus $2,000 per claim recovery provision, are designed to insure that the Government be indemnified for damage and cost to it occasioned by the filing of a false claim. As the courts have recognized, "surely, no proof is required to convince one that to the Government a false claim, successful or not, is always costly." Toepleman v. United States, 263 F. 2d 697, 699 (C.A. 4), certiorari denied, 359 U.S. 989. It is submitted, therefore, that there is no basis for departing from the clear and unambiguous wording of the statute which imposes liability for filing a claim "knowing such claim to be false, fictitious,

---

8/ The Supreme Court in Morissette specifically recognized that the defendant "could be held liable for a civil conversion" without proof of intent to convert. 342 U.S. at 270, fn. 31.

or fraudulent" [Emphasis added]. See Acme Process Equipment Co. v. United States, 347 F. 2d 509, 527, fn. 26, reversed on other grounds, 385 U.S. 138, rehearing denied, 385 U.S. 1032, where the Court of Claims (per Davis, J.) rejected the assertion that intent to defraud is a precondition to liability under the first clause of the False Claims Act:

> The Park Motors case [107 F. Supp. 168 (E.D. Tenn.)] held that the clause of the False Claims Act with which we are concerned requires a finding of specific intent to defraud. But the language of the statute discloses no such element. Since "proceedings [under the False Claims Act] are remedial and impose a civil [rather than a criminal] sanction." (United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 * * *), we see no justification for adding a requirement that specific intent to defraud be proved.

Second, as the Supreme Court declared in Rainwater v. United States, 356 U.S. 590, 592, the provisions of the False Claims Act "must be 'given their fair meaning in accord with the evident intent of Congress'." And, as the Court recently stated in United States v. Neifert-White Co., 390 U.S. 228, 232: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil [footnote omitted]." In the instant case, the congressional intent is unmistakable--civil liability attaches whenever a claim is filed which is known to be "false, fictitious, or fraudulent [Emphasis added]." The suggestion that a requirement of intent to defraud was intended by Congress as a precondition to liability becomes rather strained when the other provisions of the Act are considered--some of which explicitly require intent to defraud.

We may add that this Court's decision in United States v. National Wholesalers, 236 F. 2d 944, certiorari denied, 353 U.S. 930, is not in irreconcilable conflict with the reasoning and authorities set out above. In National Wholesalers, the record indisputably established that the defendant had deliberately mislabled goods sold to the Government, and this Court ruled that the "crude and deliberate mislabling" could have only one purpose -- viz., "to work a deceit on the government." 236 F. 2d at 950. Because the record plainly established a specific intent to defraud, the Government did not argue that any lesser standard for liability was required. Instead, the Government simply took the position that whatever state of mind was required for liability under the Act, it was met in the particular case.[9/] Thus, this Court's statement that "Undoubtedly there must be the intent to work a deceit on the government," citing the Morissette case (236 F. 2d at 950), did not constitute a rejection of any litigated contention that a lesser standard of liability was sufficient under the Act.[10/]

b. In any event, whatever the precise nature of the state of mind required for liability under the False Claims

---

9/ See Brief for Appellant; Reply Brief for Appellant.

10/ The other court of appeals decision cited by appellees, United States ex rel. Brensilber v. Bausch & Lomb Optical Co., 131 F. 2d 545 (C.A. 2), affirmed by an equally divided Court, 320 U.S. 711, was limited by the Second Circuit in United States ex rel. Weinstein v. Bressler, 160 F. 2d 403, 404, to the third type of liability under the Act, viz., conspiring to defraud the Government.

Act, we submit that the record indisputably establishes a violation of the Act in the case of defendant-appellee Lennard L. Mead. As the Tenth Circuit stated in Fleming v. United States, supra, 336 F. 2d at 479, "[W]here a person files a claim, which he knows is false, for the purpose of obtaining approval or payment of the claim, we think there is a reasonable inference, almost a necessary implication, that he intends to deceive."

As we have seen (supra, pp. 2-3,5), under the agricultural regulations here involved, the Government's payments were based upon the "cost" of the practice to the farmer or rancher, and the Government derived its cost figures from the invoices prepared and submitted by Mead. Mead admitted that he knew that the Government's payments would be based upon the "cost of the particular project" to "whomever I was doing the work for" (Tp. 152-153), and that he "prepared [the] invoices which were used by the Government to determine the federal cost share * * * " (Tp. 204). In the light of these facts, and ordinary commercial usage, Mead must have known that the "Bill to" the various farmers or ranchers which he prepared and filed with the Government (see supra, p. 4) could have only one meaning to the Government -- viz., it represented the prices actually charged by Mead for his work. Thus, Mead clearly knew that the Government would make payments for the conservation practices on the basis of the actual cost figures represented on the bills which he filed with the Government. And those figures were clearly false -- for Mead admitted (Tp. 152-153) that the

figures on those invoices were not, in fact, the prices actually charged the farmers and ranchers. Those actual costs were contained on the "duplicate" invoices prepared by Mead, which he sent to the farmers and ranchers, but not to the Government (see supra, p. 5).

In short, we think it clear that Mead knew that by misrepresenting his actual arrangements with the farmers and ranchers he would receive more money from the Government than he would receive if he filed true invoices. Surely, therefore, Mead had whatever state of mind is required for liability under the False Claims Act.

Appellees' suggestion (Appellees' Brief, pp. 23-24) that Mead did not purport to represent the actual costs of the practices on the "Bill to" the farmers and ranchers which he filed with the Government, but only the "fair price" or "true cost" of the project, is, as we have seen, totally inconsistent with ordinary commercial usage and with Mead's admission that he knew that the Government's payments were to be based upon the actual cost to the farmer or rancher and that the Government would compute the payments on the basis of the invoices submitted to it by him (Tp. 152-153, 204). Mead's references at trial to "true cost" (Tp. 152-153) were obviously an attempt to justify his calculated deception on the specious theory that the Government "got its money's worth" (Tp. 383). As we have seen, however (supra, pp. 2-3), that argument is a non-sequitur under the agricultural regulations here involved.

e may add that, contrary to appellees' assertion (Appellees' rief, pp. 19-20), there is absolutely no evidence that Mead or any of the other defendant-appellees) were misled by the eferences to "fair price" in Form ACP-250, which were explained y the United States Attorney at trial as deriving from a war- ime need to insure that the contractor did not receive excess rofits (Tp. 317-318).

Although further evidence is hardly necessary, the record ontains irrefutable proof that Mead had whatever state of mind s a requisite of liability under the False Claims Act. In a tatement dated February 2, 1960, Mead stated, inter alia (Pltf's. xh. No. 81, pp. 1-2):

> I constructed several erosion control dams under the 1956, 1957, 1958 and 1959 programs. I knew that the regulations for the 1956, 1957 and 1958 programs in Ventura County, California, established the maximum Federal Cost Share payments to farmers under that practice at 30¢ per cubic yard for the earth used to construct the dam and that those cost shares were further limited to 80% of the practice costs. Also late in 1958 the program was changed to further limit the amount of the Federal Cost Share to not more that 60% of costs up to 30¢ per cubic yard. The same restriction applied to the 1959 program. However the 1959 maximum share was reduced to 24¢ per cubic yard late in 1959.
>
> During 1956, 1957, 1958 and until about June of 1959 I constructed several of the erosion dams for 30¢ per cubic yard, the amount of the Federal Cost Share, but prepared invoices which were submitted to the Government showing costs in excess of that amount. I also furnished the farmers invoices listing the larger amount but then gave them discounts which reduced the amount of the statements or collected only the amount of the Federal Cost Share.

I knew at the time that the methods which I used to obtain the maximum cost share for the farmers were not proper but inasmuch as the Soil Conservation Service office at Moorpark, California, knew how I was invoicing the farmers and how I operated my business and approved of the procedure by even obtaining A.C.P. practice jobs for me under those conditions, I thought that the method was permitted. I also knew that other contractors were using similar methods of invoicing their work on ACP practices in this county. 11/

Sometime in June or July, 1959, Eldridge Cornell, the Manager of the County ASC office at Oxnard, California, asked to see my ACP records in connection with the Purchase Orders which I had submitted to his office. At that time I showed him my records and advised him of the method I used in invoicing and billing the farmers. He told me that my method was not permitted under the regulations and that a refund of excess payments would have to be made to the Government. I then ceased to give discounts to the farmers or to collect only the amount of the Federal Cost Shares. My business dropped considerably after that, in fact I did only about one tenth as much work in 1959 as I had done in 1958 under the Agricultural Conservation Program. Operating in line with the regulations nearly put me out of the construction business [emphasis added].

The above statement by Mead demonstrates beyond peradventure that he was thoroughly familiar with the government program, knew precisely what he was doing, and knew that he was defrauding the government. To reiterate, as he specifically stated above, "I knew at the time that the methods which I

11/ At the trial, appellees did not contend, and no evidence was introduced to establish, that any government agent had knowledge of any improper practices. See Pre-Trial Conference Order, Tr. 78-83. Indeed, such a contention would be pointless, for the United States cannot be estopped to assert violations of the False Claims Act by unauthorized acts of its agents. See Utah Power & Light Co. v. United States, 243 U.S. 389, 409; ANA Small Business Investments, Inc. v. S.B.A. (C.A. 9, Dkt. No. 21,214, decided March 12, 1968, Slip Opin., p. 5).

used to obtain the maximum cost share for the farmers were not proper * * * ." 12/

Finally, we note that while the district court made no express finding on Mead's state of mind (and while none is necessary on this record), we think that the court below implicitly recognized that Mead had the state of mind necessary

---

12/ Despite his "limited education" (Appellees' Brief, p. 4), Mead managed to perform some rather complex calculations. E.g., his 1960 statement also contains the following admission (Pltf's. Exh. No. 81, p. 3):

> Richard Quine
>
> I constructed an erosion control dam for Richard Quine under the 1959 program. I agreed to build the dam for the Government cost share of 30¢ per cubic yard plus not more than $500.00. The dam (actually 2) contained 7552.32 cu. yards of dirt and the spillway diversion ditch 621.29 cubic yards. I prepared an invoice for the Government, which I submitted to the County ASC office with my Purchase Orders listing the dam costs at 50¢ per cubic yard and the diversion ditch at 29¢ per cubic yard, the invoice totaled $3956.09. The Federal cost share for the dam was 60% of the costs up to 30¢ per cubic yard and for the ditch 70% up to 20¢ per cubic yard, therefore I listed the dam costs at 50¢ per yard and 29¢ per yard on the ditch so that the Government would make the maximum payment. I prepared a separate invoice for Quine listing the total costs as $2,993.96. I then gave an additional $104.16 discount so that Quine's share of the invoice was $500.00. (The Govt paid the remaining $2389.80).

Mead's statement also contains the following admission with respect to the 1958 Hohn transaction (Pltf's. Exh. No. 81, p. 4):

> * * * My hourly rate records disclosed that, on an hourly basis I would have charged $1980.50 for the entire job and so even the Federal Cost Share [$2064] was greater than my normal charges for the job.

for liability under the Act. [13]

B. THE MISTAKE CLAIMS

Appellees respond to our mistake claims against Mead [14] by arguing that the Government "got its money's worth" (Appellees' Brief, p. 27). As we have demonstrated, however (supra, pp. 2-3), that argument is a non-sequitur, for under the agricultural regulations here involved the Government did not undertake to purchase conservation practices, but was simply engaged in a "cost-sharing" program. There is no doubt that the Government paid out more money than it would have paid out if the true facts had been known to it. Thus, the Government's mistake claims, as to which no statute of limitations exists, were plainly established. See United States v. Wirtz, 303 U.S. 414, 415; Grand Truck Wn. Ry. Co. v. United States, 252 U.S. 112, 120-121; Mt. Vernon Cooperative Bank v. Gleason, 367 F. 2d 289, 291 (C.A. 1); Kingman Water Co. v. United States, 253 F. 2d 588, 590 (C.A. 9); Anderson v. United States, 123 F. 2d 13, 16 (C.A. 9).

13/ Thus, the district court found, inter alia, that Mead (and the farmers and ranchers) understood that a portion of the total cost of the conservation work was to be charged to the farmer or rancher (Finding 15); that Mead advised the farmers and ranchers that he would perform conservation work for them "at a cost commensurate with" their ability to pay, and would, in certain cases, accept non-cash payments (Finding 17); that in cases where the work was done under such agreement, Mead prepared, and sent to the farmer or rancher involved, a separate invoice showing that Mead was giving the farmer or rancher a "discount" and that the farmer or rancher was paying "less than his proportionate share of the total cost of the work" performed by Mead (Finding 18); and that the documents filed with the United States "did not reflect the arrangements between the defendant Mead and the other defendants * * * " (Finding 20) (Tr. 103-104).

14/ The mistake claims are alternative to the False Claims Act claims except insofar as the statute of limitations may have run with respect to certain violations of the False Claims Act.

II. THE FALSE CLAIMS ACT AND MISTAKE CLAIMS AGAINST THE OTHER DEFENDANTS-APPELLEES

A. THE FALSE CLAIMS ACT VIOLATIONS

Our main brief demonstrated (pp. 28-29) that the other efendants-appellees "knowingly" made false claims upon or against he United States. As stated there, Mead testified that he usu-lly sent a copy of the invoice he prepared for the Government o the farmer or rancher, and that, at about that time, he lso mailed or gave the farmer or rancher the other invoice howing a discount (Tp. 140-141, 172, 210, 383-384). The Govern-ent witness, Mr. Cornell, testified that the forms (ACP-245 and CP-250), which contained Mead's inflated cost figures, were igned by the farmer or rancher after completion of the practice Tp. 47, 61, 80, 86). And the district court found that the armers and ranchers understood that part of the total cost of he conservation work was to be borne by them (Finding 15); nd that Mead sent to the farmers and ranchers a separate invoice eflecting the fact that they were receiving a "discount" and aying "less than * * * [their] proportionate share of the total ost of the work" performed by Mead (Findings 17-18) (Tr. 103-04).

On this record, we submit that the only reasonable inference s that the other defendants-appellees were fully aware that the pplications filed by them constituted false claims upon or gainst the United States, and that they also had whatever state f mind is necessary for liability under the False Claims Act.

Appellees' Brief relies (pp. 24-25) upon the protestations of lack of knowledge by most of the other defendants-appellees, and the claim of some of them that they did not know how the Government program operated. However, as shown above, the district court seems to have rejected those contentions.

There is, of course, no merit in appellees' assertion (Appellees' Brief, p. 25, fn. 8) that the district court's finding (No. 18) that Mead sent the discounted invoices to the farmers and ranchers may be disregarded because it is based upon the "misunderstanding" of appellees' counsel, which the district court "inadvertently overlooked." That finding is supported by Mead's testimony as to his general practice with regard to mailing "duplicate" invoices and is not clearly erroneous. Indeed, we doubt that appellees, whose counsel prepared the findings, may challenge any of them on appeal. See Brooks Bros. v. Brooks Clothing of California, 5 F.R.D. 14, 15 (S.D. Calif.); cf. John B. Stetson Co. v. Stephen L. Stetson Co., 133 F. 2d 129, 131 (C.A. 2).

We may add that if this Court does not agree with our contention that the record inescapably establishes that the other defendants-appellees had the requisite state of mind for liability under the False Claims Act, a remand for further findings on this issue would be in order, for the district court certainly did not make any findings absolving these defendants-appellees on the basis of lack of knowledge or intent to deceive.

B. THE MISTAKE CLAIMS

Appellees cannot refute our mistake claims against the other defendants-appellees by asserting (Appellees' Brief, p. 28) that they "received no payments and did not make or cause any mistake." Plainly, the farmers and ranchers derived substantial benefit from the agricultural program here involved, and their actions, together with those of Mead, caused the Government to make excessive payments under the program. The mistake claims against them, therefore, were clearly established.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, Jr.,
United States Attorney,

JOHN C. ELDRIDGE,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

MAY 1968

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my

opinion, the foregoing reply brief is in full compliance with those rules.

Leonard Schaitman

LEONARD SCHAITMAN,
Attorney,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

LEONARD SCHAITMAN, being duly sworn, deposes and says:

That on May 24, 1968, he caused one copy of the foregoing Reply Brief for the United States to be served by air mail, postage prepaid, upon counsel for appellees:

David D. Kinley, Esquire
300 West 3rd Street
Post Office Box 312
Oxnard, California 93003

William L. Boyes, Esquire
2185 Ventura Boulevard
Camarillo, California 93010

Paul B. Noel, Esquire
60 Olson Road
Thousand Oaks, California 91360

Carl A. Stutsman, Jr., Esquire
445 South Figuroa Street
Los Angeles, California 90017

Leonard Schaitman
LEONARD SCHAITMAN,
Attorney,
Department of Justice,
Washington, D. C. 20530.

Subscribed and sworn to before
me this 24th day of May, 1968.

NOTARY PUBLIC

My Commission expires